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Supreme Court, U.S.
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No. 95-1114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

J.S.G. BOGGS,

Petitioner,

vs.

ELJAY BOWRON, ROBERT RUBIN, and JANET RENO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

KENT A. YALOWITZ
Counsel of Record
BRUCE R. KELLY
MARLA EISLAND
399 Park Avenue
New York, New York 10022
(212) 715-1000

DENNIS G. LYONS
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
Attorneys for Petitioner

Of Counsel:
ARNOLD & PORTER
Washington, D.C. and
New York, New York

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REPLY BRIEF FOR THE PETITIONER

I. THE LOWER COURTS HAVE CRIMINALIZED AN ALARMING PORTION OF PROTECTED SPEECH, AND THE SOLICITOR GENERAL HAS GONE ALONG

The Department of Justice of the United States is of the view that 18 U.S.C. § 474, a felony statute, is applicable to anyone who "knowingly" makes an image "in the likeness" of money and that any such image is subject to forfeiture as contraband. What does this amazing theory mean in practical terms? Consider two recent "violations": an exact-size reproduction of a $1,000 bill printed on the front page of the March 3, 1996 Sunday edition of the *New York Times*; and a color reproduction of a $100 bill in the February 12, 1996 issue of *Time* Magazine (page 50). According to the analysis of the Solicitor General—and of the lower courts—every copy of these august publications is "contraband" and subject to seizure. We are sure that the editorial,

publishing, and printing staffs of these news organizations would be shocked to learn that they have engaged in felonious behavior; yet, according to the Solicitor General, they have done just that—for surely they "knew the features" (Govt. Br. 11) of the images they were reproducing. We can only conclude that these great news organizations were blithely unaware of the serious and severe penalties that the Government contends attach to activities such as theirs.[1]

In light of this widespread ignorance, the didactic effect of an opinion on the merits would appear to be of great value in helping to protect the Government's asserted interest.

The Government's treatment of Boggs stands in sharp contrast to its anemic enforcement efforts against the publishers of the *New York Times*, *Time*, and a host of other newspapers and magazines (*see* Pet. 16-17 & n.13; Pet. App. 51a-54a). Boggs has been repeatedly censored and repeatedly threatened with arrest. Secret Service agents have smashed his eyeglasses in their zeal to confiscate his work—work that graces the collections of the Smithsonian Institute, the Art Institute of Chicago, the British Museum of Art, and the Museum of Modern Art. While the Government attempts to suggest that its acts were in response to some kind of borderline counterfeiting operation, the record belies that suggestion (*see* Pet. 4-5). The District Court made explicit and unchallenged findings that Boggs has no intent to deceive anyone into accepting his work as money and that no one has ever

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[1]The lower courts recognized that the statute's phrase "intent to use" cannot mean, as apparently suggested by the Government here, "intent to use for any purpose." Instead, at Respondents' urging, they held that it must be narrowed to mean "intent to use for substantial economic benefit" (Pet. App. 38a). The examples just given are unaffected by the Government's protean litigating posturing, however, for they involved images of money used for "substantial economic benefit"; these publications are not throwaways; subscriptions and newsstand copies must be paid for.

complained to any law enforcement authority of being so deceived. *See* Pet. App. 35a & n.35. We wonder why Boggs seems to be a more appealing target than the mass media publishers ignored by the Government.

Because the Government continues to suggest (Br. 4) that Boggs' work is indistinguishable from counterfeit, we have supplied additional illustrations of Boggs' work in the Appendix to this reply brief. We note that the Government has not presented any record likenesses at all of Boggs' work to this Court.[2]

II. RESPONDENTS HAVE ABANDONED PRINCIPLES OF STATUTORY CONSTRUCTION AND CONSTITUTIONAL LAW

In order to accommodate the Secret Service's position in this case, the Solicitor General has been forced to abandon what he told this Court only two Terms ago in *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994). The Solicitor General neither responds to nor even acknowledges our discussion of that case (Pet. 12) and the two central propositions that he urged and that the Court applied: first, that the Court will construe a statute so as to avoid constitutional problems unless such construction is plainly contrary to the intent of Congress; and second, that implicit in the criminal law is a "background assumption" requiring *scienter*.

A. *The Lower Courts' Strict-Liability Holding Is Flatly Unconstitutional*—The constitutional problems created by the

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[2]The Government's suggestion (Br. 8) that the relief requested in this Court turns on the *appearance* of the bills in the record, though, is flatly misleading. An unconstitutional statute may not be enforced against Boggs regardless of the appearance of his work; and, as the District Court pointed out, if section 474 must be read to carry the *scienter* element required at common law, "no jury could find that the statute applies to Boggs." Pet. App. 35.

interpretation of section 474 made by the lower courts and defended by the Government appear beyond repair. To begin, the statute was interpreted below as a strict-liability felony. While Respondents attempt to run away from the lower courts' holdings to this effect, the District Court could not have been clearer: "Congress included . . . strict liability offenses when such would aid in their efforts to drive out counterfeiting." Pet. App. 41a n.39. The Court of Appeals agreed. Pet. App. 2a (affirming for "substantially the reasons set forth" below). The Government does not and cannot deny that strict-liability felonies are forbidden where they will have a chilling effect on speech. *See X-Citement Video, Inc.*, 115 S. Ct. at 472; *Smith* v. *California*, 361 U.S. 147, 151 (1959). So the Government puts forward its own notion of "*scienter*" or "*mens rea*" in this Court. This notion has only trivial and negligible content—the Government says that it is enough that the actor had knowledge of what she was saying or doing—a simple "knowing" concept in clause six and a simple "intent to use" concept in clause five. The Government's position is like saying that a statute which has an express mental element such as "whoever knowingly votes, not being entitled to do so, shall be guilty" refers literally to people who "knowingly vote" (and thus excludes only those persons who vote thinking that they are doing something else) rather than covering those who vote with knowledge that they are not entitled to do so. The Government thus cuts out any connection to counterfeiting from this criminal statute, albeit in a way that verbally parts company with the "strict liability" rationale of the courts below.

B. ***The Government's Proposed "Fix" of the Lower Courts' Constitutional Misstep Is Unconstitutional***—Converting the statute into one with the minimalist *mens rea* elements proposed by the Government would have no practical effect other than "to criminalize a broad range of apparently innocent conduct." *Liparota* v. *United States*, 471 U.S. 419, 426 (1985). If the Government were correct, then every person publishing the magazines and newspapers identified above (*supra* p. 1) and in our Petition (pp. 16-17 & n.13, 51a-54a) or possessing copies of them

(except those inadvertently possessing them) would stand vulnerable to criminal prosecution. Such widespread criminalization would hardly comport with "settled expectations that the contents of magazines and film are generally [not] subject to stringent regulation." *X-Citement Video, Inc.*, 115 S. Ct. at 468-69. The Government's effort to substitute a trivial *mens rea* requirement for one that has some connection with the substantive evil of counterfeiting does not adequately take account of the First Amendment's prohibition on criminal statutes with *scienter* elements that "have the collateral effect of inhibiting the freedom of expression, by making the individual more reluctant to exercise it." *Smith* v. *California*, 361 U.S. at 151. The First Amendment requires not merely *some* level of intent, but one that adequately protects free expression in the context of public expectations. That is why this Court firmly rejected the argument that it would be enough for a libel defendant to remain free to prove the truth of allegedly libelous statements, and instead held that the First Amendment requires "actual malice"—the level of intent commonly required by most states in libel cases. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964).

Moreover, even with the minimalist "knowing" *mens rea* element, the size and color restrictions on speech imposed by the statutory scheme cannot pass constitutional muster. To be sure, a plurality of this Court held those restrictions to be valid as applied in a particular case to Time, Inc. some 12 years ago. *Regan* v. *Time, Inc.*, 468 U.S. 641, 658-59 (1984). But the Court never resolved the question of the restrictions' general and facial validity. And radical changes in technology in a dozen years have made the restrictions hopelessly out of date. In 1984, a counterfeiting operation required expensive, specialized equipment. Today, as Respondents have repeatedly told Congress—and as the undisputed testimony in the record confirms—the would-be counterfeiter has access to relatively low-cost computer and laser-printing equipment. *See* Pet. 17-18 & nn.14-15. The Government thus concedes (Br. 9) that "other measures may be more effective" in responding to this new threat and that "the size and color restric-

tions do not protect against counterfeiters who use the latest high-tech equipment."

But to say, as the Government does (*id.*), that "those restrictions may still deter many potential counterfeiters who have no access to such equipment or who lack the expertise to operate it" is doublespeak. Laser printing and desktop publishing have become ubiquitous. The Government's unstated premise is that the new technologies are arcane, inaccessible, and expensive—like cyclotrons, particle physics accelerators, or the like. Instead, as Respondents' own statements outside of this Court confirm (see pp. 6-7, below), the era of desktop computers and cheap color laser copiers has eclipsed the old-fashioned methods of counterfeiting, both in quality of product and in cheapness and accessibility of equipment—just as desktop publishing tends to make the old-fashioned, bulky mechanical linotypes, engraving equipment, and printing presses obsolete.

Remarkably, the Government even tells this Court (Br. 10)—without support from the record or elsewhere—that "[n]othing that has occurred since this Court's decision in *Regan* suggests that the size and color restrictions do not continue to serve an important purpose." That fantasy is belied not only by the record (*see* Bittman Decl. ¶ 8) but by Respondents' repeated statements to Congress that advances in modern technology require a significant overhaul of their whole anti-counterfeiting efforts. *See* Pet. 17-18 & nn.14-15. Even within the last month, for example, the Undersecretary of the Treasury for Domestic Finance reminded Congress that "the rapid advancement that has taken place in recent years in reprographic technologies such as color copiers and computer scanners has dictated that we take more significant steps in order to maintain the security and integrity of U.S. currency and stay ahead of the counterfeiting threat."[3] Respondent Eljay

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[3]*Counterfeiting of U.S. Currency Abroad: Hearing Before the Subcomm. on General Oversight and Investigations of the House Comm. on Banking*, 104th Cong., 2d Sess. (Feb. 27, 1996) (Prepared Statement

Bowron, Director of the Secret Service, added that "[t]he equipment used by the 'casual' counterfeiter and the career criminal continues to be readily available. As technology moves forward, that same equipment becomes more affordable, and more accessible."[4]

Moreover, the First Amendment requires a *comparative* analysis: a statute is not "narrowly tailored" whenever "a substantial portion of the burden on speech does not serve to advance the goals" of the Government. *Simon & Schuster, Inc.* v. *New York Crime Victims Bd.*, 502 U.S. 105, 122 n.** (1991). The degree to which the Government's goals are advanced by this particular statute has dropped like a stone, because of the rapid changes in technology during recent years. In light of those changes, in light of the divided holding of *Regan* v. *Time, Inc.* (the District Judge in this case candidly acknowledged having difficulty parsing *Regan*[5]), and in light of this Court's status as the ultimate arbiter of constitutional law,[6] an evaluation of the statute's constitutionality is warranted.

C. ***The Government's Reading of the Statute Violates the Rules of Statutory Construction***—Even if the Government's proposed minimalist *mens rea* element passed constitutional muster, it would not comport with settled rules of statutory construction. The Government's reading of the statute drives the Court toward—rather than away from—constitutional issues. That

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of Undersecretary Hawke).

[4]*Id.* (Prepared Statement of Director Bowron).

[5]C.A. App. 245 ("it put me to sleep").

[6]*See Payne* v. *Tennessee*, 501 U.S. 808, 827-28 (1991); *United States* v. *Scott*, 437 U.S. 82, 101 (1978); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 543 (1962); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

reading is also drawn out of thin air. We had thought that questions of statutory interpretation were to be resolved by attempting to discern what Congress intended—not what suits the Government in a particular case. The Government's proposed minimalist "knowing" *mens rea* element, though, does not come from the text of the statute; it does not come from the statute's common-law roots; it does not come from the statute's legislative history; and it does not come from applying canons of statutory interpretation. All of those sources for divining congressional intent point to the conclusion that Congress intended to incorporate the level of *scienter* applicable at common law—a sensible interpretation that would save the statute from unconstitutionality. Yet the Government claims to have navigated the straits between its Scylla of strict liability and its Charybdis of admitting that the statute carries the common-law level of *scienter* (thus excluding Petitioner) by inventing a minimalist mental element that comes from nothing. That is directly contrary to the Government's own position in *X-Citement Video, Inc.*

III. THE CONFLICT IN THE CIRCUITS IS UNDENIABLE

In our Petition we demonstrated that a number of courts have interpreted and applied section 474 and closely analogous statutes to carry the *mens rea* level required at common law—an intent to engage in passing counterfeit money as genuine or a similar unlawful purpose. Pet. 19-20 & nn.20, 22. The Government ignores all but three of these cases. Its effort to distinguish even these three is unavailing. Thus, the Eleventh Circuit in *United States* v. *Parr*, 716 F.2d 796 (11th Cir. 1983), held that section 474 was violated by a defendant with an "intent to use for [the] unlawful purposes" of enticing others into a counterfeiting conspiracy. 716 F.2d at 808. Nowhere did that court approve the Government's position here—that "knowledge" or "intent to use for any purpose"—is sufficient to convict.

Similarly, in *Britt* v. *United States*, 391 F.2d 540 (5th Cir. 1968), the Fifth Circuit held that the evidence supported the jury's

conclusion that the defendant "had the requisite criminal intent to commit the offense," because "counterfeiting was probably committed by someone." 391 F.2d at 542. The defendant's "requisite criminal intent" was to engage in "counterfeiting." In fact, the defendant argued that he was "merely conducting a scientific experiment." 391 F.2d at 541. If the Fifth Circuit had thought that a "knowing" state of mind was sufficient for conviction, surely it would have observed that this purported defense was irrelevant, for someone conducting a scientific experiment possesses a "knowing" state of mind: he or she "knows the features" (Govt. Br. 11) of the experiment's object.

Finally, the Eighth Circuit in *Michener* v. *United States*, 157 F.2d 616 (8th Cir. 1946), *rev'd on other grounds*, 331 U.S. 789 (1947), concluded that "possession would be innocent were it not possessed with intent to use the plate in counterfeiting." 157 F.2d at 620. We are puzzled by the Government's attempt to distinguish this case on the theory that the statute at issue was not section 474, for it was section 474's direct predecessor.[7] And while the court did not restate the obvious—that *all* clauses of the statute carried this *mens rea* requirement—its entire discussion of intent would have been irrelevant if there were a mere "knowing" *mens rea* level for some clauses of the statute.

* * * *

A radical departure from the public's settled expectations has been asserted as the basis for upholding the judgments below. It is a departure that is applicable to a great number of legitimate

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[7]Section 150 of the first revision of the Criminal Code, ch. 321, § 150, 60th Cong., 2d Sess., 35 Stat. 1088, 1116 (Mar. 4, 1909), at issue in *Michener*, was redesignated—with minor changes in phraseology—as section 474 in the 1946 recodification of the Criminal Code, ch. 645, 80th Cong., 2d Sess., 62 Stat. 683, 706 (June 25, 1948), where it remains today.

publishers, advertisers, and artistic institutions. It is a departure that required the lower courts and the Government to ignore well-established constitutional rights and settled principles of statutory construction. And it is a departure from the interpretations of the other courts of appeals applying the statute.

CONCLUSION

For the foregoing reasons, and the reasons stated in our Petition, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

KENT A. YALOWITZ
Counsel of Record

BRUCE R. KELLY
MARLA EISLAND
399 Park Avenue
New York, New York 10022
(212) 715-1000

Of Counsel:
ARNOLD & PORTER
Washington, D.C. and
New York, New York

DENNIS G. LYONS
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Attorneys for Petitioner

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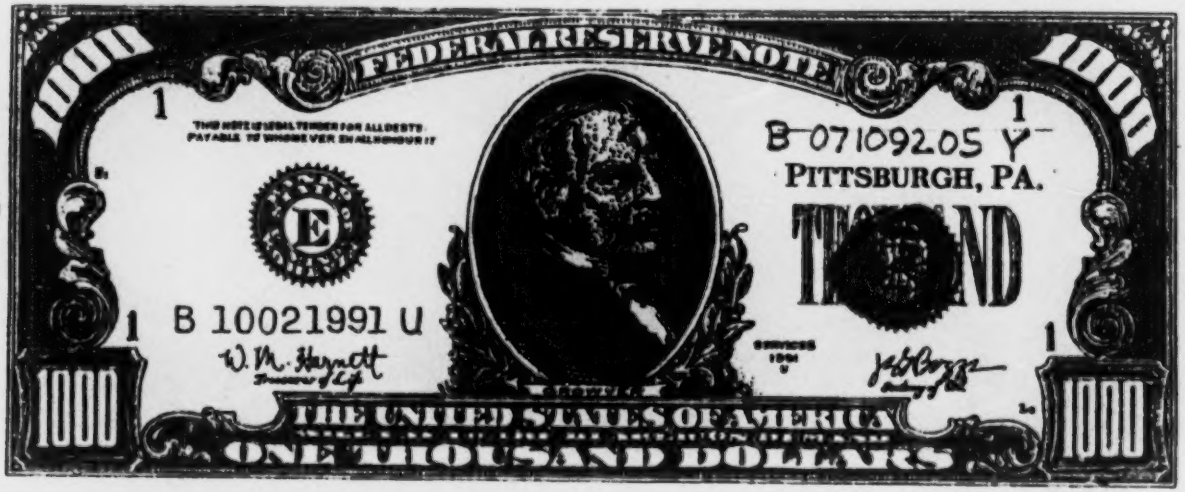
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